

New Developments in Groundwater Contamination Law: “Passive Migration” of Chemicals Under Prop 65 and the Setting of Public Health Goals for Perchlorate in Drinking Water

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In the final days of 2002, California courts issued decisions in two important cases related to groundwater contamination. The first was a decision by a California Court of Appeal holding that under Proposition 65 the “passive migration” or “continued presence” of contamination in the soil does not constitute a discharge or release of contaminants into sources of drinking water. The second was an order from the Superior Court for the County of Los Angeles concerning the procedures for setting of a public health goal for perchlorate in drinking water by the Office of Environmental Health Hazard Assessment. Perchlorate is widely seen as a serious threat to drinking water supplies throughout the state, and especially in southern California.

Prop 65 and Hazardous Substances in Soil

On December 17, 2002, the Court of Appeal, Second District issued its decision in the case of *Consumer Advocacy Group, Inc. v. Exxon Mobil Corporation*. The decision interpreted provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65 (“Prop 65”). The plaintiff in the action, Consumer Advocacy Group, sued Exxon Mobil Corporation (“Exxon”) and four other

defendants based on their ownership and operation of 21 gas stations in August 1999, alleging that chemicals present in the soil¹ beneath the stations constituted the discharge or release of prohibited chemicals into sources of drinking water in violation of Prop 65. Exxon had not operated any of its gas stations since July of 1995, meaning that the only theory by which it could have been sued within the four-year statute of limitations² was that the “continued presence” of the chemicals in the soil, or their “passive migration” into groundwater, constituted a discharge or release under Prop 65.

The plaintiff argued that the chemicals present in the soil beneath Exxon’s former gas stations were continually discharging or releasing contaminants due to their movement

through the soil and into groundwater, and would do so each day “until no amount of the chemicals remains in soil and/or groundwater at the site.” The Court of

Appeal rejected this argument partly based on the common dictionary meanings of the words “discharge” and “release,” which it considered to collectively denote “movement from a place of confinement to another place where there is no confinement” through some action by a party. The Court also relied on the explanatory material

contained in the ballot pamphlet published for the initiative election for Prop 65. The Court expressly rejected plaintiff’s argument that definitions of “discharge” and “release” used in either the Water Code or the federal Comprehensive Environmental Response, Compensation, and Liability Act (the so-called “Superfund” law, which governs clean-up of hazardous substances) should apply to Prop 65.

The decision was significant because of the results if the plaintiff’s arguments had been accepted. Prop 65 provides for civil penalties of up to \$2,500 per day for discharges or releases of prohibited chemicals, which, under the plaintiff’s theory, a discharger could have incurred on a daily basis until complete removal of all prohibited chemicals from the soil and groundwater at a site. A single initial discharge of chemicals could very quickly result in a large liability for the discharger under this scheme. Prop 65 would thereby provide a strong incentive for clean-up as well as a disincentive for the initial discharge or release. If it had been adopted by the Court, the plaintiff’s argument would also have prevented the statute of limitations from barring a lawsuit as long as contamination remained. These results would have significantly broadened the scope of Prop 65, but were stopped by the decision of the Court of Appeal.

“Does the continued presence of chemicals in soil constitute a release under Prop 65?”

Perchlorate PHG Delayed

In the second decision, issued on December 3, 2002, in the case of Lockheed Martin Corporation v. Office of Environmental Health Hazard Assessment, Case No. BS077063, the Superior Court for the County of Los Angeles ordered the state Office of Environmental Health Hazard Assessment ("OEHHA") to submit its revised report related to the public health goal ("PHG") for perchlorate in drinking water to the public for a new 45-day comment period and to the University of California for peer review. The plaintiffs in the case, Lockheed Martin Corporation ("Lockheed") and Kerr-McGee Chemical LLC ("Kerr-McGee"), had alleged various deficiencies in the process used to arrive at the PHG as proposed by OEHHA.

The result of this case is a delay in the setting of a PHG for perchlorate by OEHHA. The California Legislature had led the nation by passing a statute requiring the setting of a PHG by January 1, 2003, and the adoption of a maximum contaminant level ("MCL") for perchlorate in drinking water by January 1, 2004. The court-ordered public comment period expired on January 24, 2003, but the peer review still remains to be completed. The final PHG will likely be published within 90 days of the delivery of the request for peer review to the University of California, or as early as the end of April 2003.

Following adoption of a PHG for perchlorate, which is based strictly on scientific evaluation of the health risks imposed by the chemical, the Legislature has mandated the adoption of an MCL for perchlorate. The delay in promulgation of the PHG will likely result in a similar delay for setting the MCL for perchlorate past January 1, 2004. MCLs must be chosen based on

a number of factors beyond health information, such as available technologies for and economic costs of water treatment. Those parties who opposed OEHHA's setting of the PHG on procedural grounds are likely to offer even greater resistance to the adoption of an MCL.

The plaintiffs in the Los Angeles Superior Court action both face huge potential liabilities related to perchlorate. Lockheed has already been sued based on its operation of a former rocket fuel plant located in Mentone in San Bernardino County by local residents who claim various health problems due to perchlorate exposure. Kerr-McGee is one of two companies that produced perchlorate outside of Henderson, Nevada for years. Surface run-off and a plume of perchlorate-contaminated groundwater emanating from the Kerr-McGee facility have been alleged to have caused the presence of perchlorate discovered downstream in the Colorado River. Perchlorate in the river has then been diverted by the Metropolitan Water District of Southern California for use in its drinking water supplies, which are distributed to residents throughout southern California. Liability for dischargers of perchlorate to drinking water purveyors, in particular, would be impacted by the MCL eventually set, since purveyors can seek damages for increased water treatment costs and a lower MCL would mean more expensive treatment.

With extremely dry conditions throughout California and the southwestern United States, and the ever-increasing value of water due to development pressures, one can expect that legal actions concerning perchlorate in California groundwater will multiply in number and increase in ferocity in the immediate future.

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¹ The chemicals of concern in the action were benzene, lead, and toluene, each of which has been determined to cause cancer or reproductive toxicity as required by Prop 65.

² The parties did not agree on, and the court did not decide, the statute of limitations that would apply to causes of action under Prop 65, but four years was the longest period that could apply to any of the plaintiff's claims. ♠